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Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH L. LEVESQUE and JOSEFA R. LEVESQUE,
Petitioners.

v.

MICHAEL YAMAGUCHI, JANET RENO, JILL HIATT, MARIAN TERRELL, KERN SMITH, REBECCA PERVOE,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro se

34 pp

QUESTION PRESENTED

Does a United States citizen have a right to present evidence of a federal criminal offense to a federal grand jury or is the federal grand jury merely the private tool of the United States Attorney?

PARTIES BELOW

Petitioners Joseph L. Levesque and Josefa R. Levesque were the plaintiffs-appellants in the court below. Respondents Michael Yamaguchi, Janet Reno, Jill Hiatt, Marian Terrell, Kern Smith, and Rebecca Pervoe were defendants-appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Joseph L. Levesque and Josefa R. Levesque, on behalf of themselves, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on November 7, 1997, rehearing denied January 30, 1998, denying petitioners a jury trial and a good-faith determination of the *issues* that they *raised*.

OPINIONS BELOW

The Court of Appeals' unreported opinion is reproduced on page 3a of the Appendix to this certiorari petition (hereafter "Pet. App."). The unreported Order denying rehearing is reproduced at Pet App. 1a-2a. The unreported District Court Order is reproduced at Pet. App. 4a-6a.

JURISDICTIONAL STATEMENT

The Court of Appeals opinion was entered on November 7, 1997. A petition for rehearing was timely filed and denied on January 30, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the indictment by Grand Jury Clause of the Fifth Amendment to the United States Constitution; Federal Rules of Criminal Procedure 3, 4, and 5; and 28 U.S.C. § 547(1).

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Federal Rules of Criminal Procedure 3, 4, and 5 provide:

Rule 3. The Complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.

Rule 4. Arrest Warrant or Summons Upon Complaint.

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified

with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate[1] at a stated time and place.

(d) Execution or Service; and Return.

(1) By Whom. The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial Limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and

1 So in original. Probably should be "magistrate judge".

discretion then residing therein and by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons[2] returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

Rule 5. Initial Appearance Before the Magistrate Judge.

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. Sec. 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint shall be filed forthwith which shall comply with

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2 So in original. Probably should be preceded by "a".

the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.

(b) Misdemeanors and Other Petty Offenses. If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U.S.C. Sec. 3401, the magistrate judge shall proceed in accordance with Rule 58.

(c) Offenses Not Triable by the United States Magistrate Judge. If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other

than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

28 U.S.C. § 547(1) provides:

Except as otherwise provided by law, each United States attorney, within his district, shall -

(1) prosecute for all offenses against the United States;

STATEMENT OF THE CASE

Petitioners, Joseph L. Levesque and Josefa R. Levesque, notified the Respondent Michael Yamaguchi, United States Attorney in San Francisco, of the following facts:

Petitioners were the victims of an extortion attempt by Respondents Kern Smith and Rebecca Pervoe for the alleged molestation of Kerlett Smith, based on the testimony of J. J. and Rosalia Troche, son and daughter of Respondent Rebecca Pervoe. Petitioners refused to submit to the extortion demands and Petitioner Joseph L. Levesque was prosecuted in Alameda County Superior Court in Oakland, California, Case No. H-17275. The events at trial verifiable from the trial transcript took place as follows:

The defense called Respondent Rebecca Pervoe, mother of J. J. and Rosalia, and questioned her about a statement she had made with an attorney, Jerry Lipkin. The prosecution objected and demanded an offer of proof. The court then excused the jury.

The defense called Respondent Rebecca Pervoe, as part of its offer of proof, out of the jury's presence. She admitted she had written the following statement:

> "Becky Pervoe
> "kids
> "Jay Troche
> "Rosalia Troche
> "I Becky Pervoe came to 22217 Montogrery (sic) St day 9/25/92 on my own free will to talk about our case and I do not want to file any charges against Joe Lavesky (sic) and I think I have some very important information in this case and I am will[ing] to testify in court to explain every[thing] about the case and I belive (sic) the[y] just want to get some money from Joe['s]

> stepmother they lied about alot (sic) of things in this case.
> "Thank you
> "Becky P."

However, Respondent Pervoe denied the facts contained in the statement. She first said that she had come to the Montgomery address with her children because she was homeless and had a drug problem. Hilda Gilgannon offered her work and a place to live. She said she had written the statement out herself:

> "but was going to throw it away because, like I said, I had a drug problem. I was on drugs. And I talked with my husband I knew it wasn't right, after I found out, you know, it just wasn't worth it. It was a place to be staying at, but also, I found out that this--I mean, it wasn't right. He needs help. He's sick. He did what he did to my kids. I feel he should be punished for it, with his back history."

Respondent Pervoe denied that she had any important information to give about the case. She denied giving the statement to anyone. She said that the statement was "in the garbage or in with my papers." She said she said she did not know how anyone got hold of it. She said that the statement was false saying, "You can see it's not signed all the way."

The defense questioned Respondent Pervoe about her meeting with attorney Jerry Lipkin. Respondent Pervoe recalled a white man being at the Gilgannon kitchen. She remembered talking to the man, but claimed she did not remember what she said to him. She denied telling Lipkin that she was a party to a conversation about dropping the charges against Petitioner or where Respondent Kern Smith

discussed the $50,000 bribe . . . She said she did not remember telling Lipkin the following:

a. Kerlett pushed the tape into the VCR and started it.
b. Kerlett jumped up on Joe's lap.
c. Kerlett's father, Respondent Kern Smith, suggested to her that the two parents settle the case against Petitioner Joseph L. Levesque for $50,000 each.
d. Kerlett's pants were baggy and probably fell down by themselves.
e. Kerlett makes up stories and likes a lot of attention.
f. The children told her that Petitioner only lowered his pants part way when he "mooned" the camera.
g. Kerlett's father and Kerlett had a problem and that he's trying to put it off on Petitioner. Kerlett told her that her father called her vagina his toy.

Respondent Pervoe did remember that she had overheard Kerlett and her daughter Rosalia talking about the case and what had happened. She said she "didn't recall exactly word-for-word" what they said.

The prosecution objected to the introduction of either Respondent Pervoe's statement or Lipkin's testimony. She said that defense counsel had not specifically asked the children what they had told their mother when they were on the stand. The court agreed with the prosecution.

Defense counsel offered to recall the children and ask them about Respondent Pervoe's statements. The court denied counsel's request because it would have to determine that Respondent Pervoe was being evasive when she chose not to remember what she told Lipkin to admit Lipkin's testimony, and because testifying had been stressful to the children.

Lipkin testified out of the presence of the jury. Lipkin said

that Respondent Pervoe gave him her written statement when he interviewed her and that it was prewritten.

Lipkin testified that Respondent Pervoe told him the following during the interview:

a. Kerlett's father, Respondent Kern Smith, was molesting her. Kerlett had told Respondent Pervoe that Respondent Kern liked to shower with her. Kerlett had told Respondent Pervoe that Respondent Kern called his daughter's vagina his toy. Respondent Kern had wanted Respondent Pervoe's daughter to stay the night frequently. Respondent Kern walked around naked a lot.
b. Respondent Kern had suggested to Respondent Pervoe that they try to get money from Hilda Gilgannon to settle the criminal case for $50,000 each.
c. Kerlett makes up stories a lot and likes to get a lot of attention.
d. The children told her that Kerlett had to keep pulling her pants up because they were baggy. About two inches of the buttock area would show from time to time.
e. Her children had told her that they saw Kerlett push the "Playboy movie" tape into the VCR.

Lipkin also testified that he spoke with Respondent Kern by telephone. Respondent Kern confirmed that he did walk around his house naked and gave baths and showers to Kerlett.

The court barred Lipkin's testimony, saying that much of it was inadmissible hearsay, some of it was irrelevant, and that the defense could not recall the children to ask them questions about what they said to Respondent Pervoe.

Petitioner Joseph L. Levesque was convicted by a jury on January 13, 1994 of California Penal Code § 288 (a) and § 647.6 (c) and was sentenced to a 15-year-to-life term of imprisonment pursuant to § 288 (a) and a 16 month consecutive sentence pursuant to § 647.6 (c).

Petitioner's extortion issue was completely ignored by Respondent Jill Hiatt who was the prosecutor, the trial judge, and the California appellate courts.

Respondent Jill Hiatt and her assistant, Respondent Marian Terrell, in order to ensure Petitioner Joseph L. Levesque's conviction, engaged in a pattern of witness tampering through the use of hand signals that was noticed in Petitioner's criminal trial and in previous trials of other individuals.

On several occasions Petitioner Joseph L. Levesque witnessed Respondent Marian Terrell signaling to the witnesses for the state with her hands, after it was brought to Petitioner's attention by a woman in the court.

Petitioner Joseph L. Levesque noticed that, on a number of occasions, the witnesses would stop what they were saying in the middle of a sentence and all of a sudden, they "didn't remember!"

At this point Petitioner turned toward Respondent, Ms. Terrell, and when he did, he caught her taking her hand down off of her face quite abruptly as though she didn't want petitioner to see it. Petitioner caught her doing this at least three times during his trial, when the state's witnesses were on the stand.

Petitioner Joseph L. Levesque noticed that, when she would touch her mouth, the witnesses would stop talking. When she would put her finger to her temple, the witness would decide not to remember. Petitioner also noticed that this was done most frequently during the cross examination by his defense attorney.

Petitioner Joseph L. Levesque brought the actions of Respondent Ms. Terrell to his attorney's attention at the time of the trial. The defense attorney told Petitioner that, "it was not in his best interest" to accuse her during the trial.

Petitioner asked his defense attorney to bring this to the attention of the judge, but the attorney was hesitant to do so and made excuses to avoid doing so. The defense attorney felt that the judge would notice it by himself.

During a recess, while Petitioner Joseph L. Levesque was sitting off in a corner of a court yard near the lake beside the courthouse, petitioner saw the witnesses sitting in the midst of the jurors of his trial. They were crying and being comforted by both Respondent Ms. Terrell and a social worker.

Petitioners had other evidence to support their claims:

a. Affidavit of Eric Conner, attorney.
b. Affidavit of Tara Landers, paralegal.
c. Letter from Ginny Gomes, paralegal, on letterhead of Thomas M. Burton, attorney. (Petitioner Joseph L. Levesque is informed and believes thereon that the case referred to in the letter is *State of California v. Neal Shumate* #H-19615.)

Respondent Michael Yamaguchi, United States Attorney in San Francisco, simply *refused* to present petitioners' evidence to a federal grand jury, giving rise to this cause of action.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Ninth Circuit's decision, is indicative of the legal anarchy that has prevailed in the Ninth Circuit Court of Appeals for some time. Other Circuits for the most part, follow Supreme Court precedent. The Ninth Circuit, in 1996 alone, was reversed in 28 out of 29 cases before the Supreme Court. See *Los Angeles Times*, Tuesday, August 5, 1997.

I.e., the Ninth Circuit is wrong 97% of the time that this Court chooses to review the case. This case is no exception.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR PRONOUNCEMENTS, THE FEDERAL RULES OF CRIMINAL PROCEDURE, AND THE NINTH CIRCUIT'S OWN PRECEDENT.

The Ninth Circuit has confused *initiating* a *prosecution* with *conducting* an *investigation*. There is a world of difference. Unfortunately, the Ninth Circuit, by changing the meaning of words, has made the two terms interchangeable. Such behavior was described in a nineteenth-century satire on the English legal system.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."

> "The question is," said Humpty Dumpty, "which is to be master--that's all."
>
> *The Annotated Alice: Alice's Adventures In Wonderland & Through The Looking Glass* by Lewis Carroll 269 (Martin Gardner 1960).

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S. Ct. 1792, 1803 (1970).

If the public does *not* have the right to every man's evidence, then this Court should plainly so state.

On the other hand, if American citizens do have the right to petition their government for the redress of grievances by presenting their evidence to a grand jury, then this Court should plainly so state. *Branzburg v. Hayes*, 92 S.Ct. 2646, 2660 (1972), *Frisbee v. United States*, 15 S.Ct. 586 (1895)(The public is entitled to every man's evidence).

The legal process wherein a private citizen could bring a criminal complaint has been with us for over 2,000 years.

> From the mid-second century B.C. Roman practice had instituted individual courts . . . to try different types of criminal offenses. Even here, however, a private individual had to bring a criminal charge before the proper court against another private citizen: in this sense, criminal procedure too was accusatorial.
>
> Peters, *Inquisition* 14 (1988).
>
> With the transformation of the Roman Republic into the Roman Empire during the reign of Augustus (31 B.C. - 14 A.D.), an enormous number of powers came into the hands of the emperor, and the structure of the Republic

was transformed.

Id. at 14-15.

> [I]t is clear that the emperor and his servants assumed more and more direct control of legal procedure, at first paralleling surviving courts and procedures, but eventually superseding them. Gradually the sources of law were narrowed down to one--the edict of the emperor.

Id. at 15.

Are the common citizens of this country at the mercy of the edict of the executive branch of the federal government for protection from crimes being committed against them? That is, are they protected only from crimes selectively chosen (victimless or high profile) by those who are placed in the Justice Department by whoever happens to be President of the United States at the time?

The legal process wherein a private citizen could bring a criminal complaint was well understood even in the nineteenth century in the federal courts of this country.

> Nor was it necessary that the application for a warrant should be made by the district attorney, as any individual might complain of the infraction of a law, and he [the judge] considered it his duty to award a warrant whenever complaint was made to him on oath of a crime's being committed, whether such warrant were applied for by the district attorney or *any other person.*

United States v. Skinner, 27 Fed.Cas. 1123, 1124 Fed.Cas. No. 16,309 (C.C. D.N.Y. 1818).

F.R.Cr.P. 5(a) makes it quite clear that "any person" may make an arrest and that a *complaint* shall be promptly filed.

It would seem that arresting someone and filing a complaint could be considered "initiating a prosecution."

The language of 28 U.S.C. § 547 (1) is quite clear:

> Except as otherwise provided by law, each United States attorney, within his district, shall -
>
> (1) prosecute for all offenses against the United States;

The word "exclusively" is simply not in the statute.

Nor is such an indication given in F.R.Cr.P. 3:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.

It is true that *Keenan v. McGrath*, 328 F.2d 610, 611 (1st Cir. 1964) does state that a private citizen cannot initiate a criminal prosecution. Both the First Circuit and the lower court were "dead wrong" in this assumption, see e.g., *Maves v. Busby*, 34 F.3d 533, 536 (7th Cir. 1994).

The language of *Keenan*, supra, in comparison with the Rule enacted by Congress, renders *Keenan* bad law and void:

> Not only are we unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court, but also to sanction such a procedure would be to provide a means to circumvent the legal safeguards for persons accused of crime . .
>
> *Keenan* at 611.

The second clause of this statement can be immediately dismissed as statistically provable nonsense.

The statistics comparing the number of indictments to the number of "no bills" is as follows:

Fiscal Year	Number of Indictments	No True Bills (%)	Total Grand Jury Proceedings
1976	**23,612**	**123 (0.518%)**	**23,735**
1977	21,412	119 (0.553%)	21,531
1978	**19,405**	**104 (0.533%)**	**19,509**
1979	16,356	90 (0.547%)	16,446
1980	**16,507**	**85 (0.512%)**	**16,592**
1981	16,699	95 (0.566%)	16,794
1982	**16,989**	**75 (0.440%)**	**17,064**
1983	17,702	63 (0.355%)	17,765
1984	**17,419**	**68 (0.389%)**	**17,487**
1985	17,051	43 (0.252%)	17,094
1986	**20,045**	**66 (0.328%)**	**20,111**
1987	19,224	39 (0.202%)	19,263
1988	**20,156**	**28 (0.139%)**	**20,184**
1989	23,172	31 (0.134%)	23,203
1990	**23,914**	**11 (0.046%)**	**23,925**
1991	25,927	16 (0.062%)	25,943
1992			**25,470**
1993			23,757
1994			**20,714**
1995			22,856
1996			**23,449**

From *Statistical Report, United States Attorney's Office*, (Fiscal Years 1976 through 1996). Note: Starting in 1992 the Statistical Report ceased to report the number of no true bills, *if* there were any to report.

F.R.Cr.P. 4 (a) does not even *mention* an attorney for the government until it refers to the *request* of the attorney for the government:

> (a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

Fourth, a criminal prosecution was *initiated* by Agent Finley of the Federal Bureau of Narcotics, pursuant to Rules 3 and 4 of the Federal Rules of Criminal Procedure in *Giordenello v. United States*, 78 S.Ct. 1245, 1247 (1958).

"Agent Finley" hardly qualifies as a United States Attorney (or even one of his assistants).

That crimes are always *prosecuted* by the federal government may be a truism, *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 86 (2nd Cir. 1972). However, a criminal complaint may be *filed* by a *private citizen*. See *In re Price*, 83 F. 830 (C. Ct. S.D. N.Y. 1897).

The decisions of the United States Supreme Court, whether right or wrong, are supreme: they are binding on all the courts of this land. *Hoover v. Hulston Valley Community Hosp.*, 545 F.Supp. 8, 13 (E.D. Tenn. 1981).

> It is the duty and right . . . of every citizen to assist in prosecuting, and in securing the punishment of any

breach of the peace of the United States."

In re Quarles, 15 S.Ct. 959, 960-961 (1894).

[A citizen] has a constitutional right to inform the government of violations of federal law . . . [a] privilege of citizenship guaranteed by the Fourteenth Amendment. See *Equal Employment Opportunity Commission v. Pacific Press Publishing Association*, 676 F.2d 1272 (9th Cir. 1982).

[I]nforming is a right or privilege secured by the Constitution or laws of the United States. See *Velarde-Villarreal v. United States*, 354 F.2d 9 footnote 3 (9th Cir. 1965).

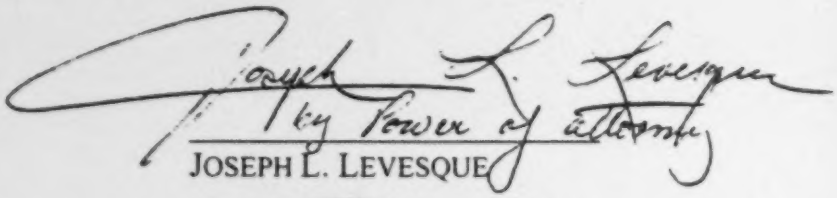
The lower court's reading of *Application of Wood*, 833 F.2d 113 (8th Cir. 1987) was simply misplaced, as can be seen by simply comparing the district court dismissal order, Pet. App. 4a-6a, with the Eight Circuit's decision in *Application of Wood*, *id.*

Ironically, those who now *control* the grand jury and do *not allow* private citizens to present evidence of federal crimes to their fellow citizens sitting on the grand jury were not allowed themselves into either the grand jury room for either deliberation or voting. See Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am.Crim.L.Rev. 701, 758 n. 291 (1972).

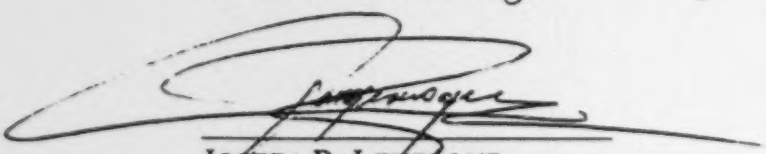
CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



JOSEPH L. LEVESQUE



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Pro se petitioners

Dated: April 21, 1998

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-15782

DC# CV-96-3465-CAL
Northern California

JOSEPH L. LEVESQUE, et al.,
Plaintiffs-Appellants,

vs.

MICHAEL YAMAGUCHI, et al.,
Defendants-Appellees.

ORDER

Filed January 30, 1998

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

The petition for rehearing filed on November 18, 1997 is construed as a motion to reconsider the court's November 7, 1997 order. So construed, the motion is denied. *See* 9th Cir. R. 27-10. The suggestion for rehearing en banc is rejected. *See* General Order § 6.11.

The alternative request for clarification is also denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-15782

DC# CV-96-3465-CAL
Northern California

JOSEPH L. LEVESQUE, et al.,
Plaintiffs-Appellants,

vs.

MICHAEL YAMAGUCHI, et al.,
Defendants-Appellees.

ORDER

Filed November 7, 1997

Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to need further argument. See *United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam). Accordingly, we grant appellees' joint motion for summary affirmance of the district court's judgment.

All pending motions are denied as moot.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-96-3465-CAL

JOSEPH L. LEVESQUE, et al.,
Plaintiffs,

v.

MICHAEL YAMAGUCHI, et al.,
Defendants.

ORDER OF DISMISSAL

Filed April 16, 1997

On December 9, 1996 this court dismissed certain of plaintiffs' claims with prejudice. Certain of plaintiffs' claims were also dismissed without prejudice, and plaintiffs were given leave to amend. Plaintiffs filed a first amended complaint, and defendants now move to dismiss that first amended complaint.

Plaintiffs' principal claim is a request for this court to order that the United States Attorney be compelled to present certain evidence, which plaintiffs say they have, to a federal grand jury for the purpose of seeking an indictment against other persons. It should be noted that this is not a matter of presenting additional evidence before a pending grand jury,

but rather plaintiffs seek to compel the United States Attorney to present a new accusation for consideration by a grand jury. The decisions of whether or not to prosecute, and what charges to file or bring before a grand jury, generally rest entirely within the discretion of the United States Attorney. The *United States v. Armstrong*, 116 S.Ct. 1480, 1486 (1996). In both civil and criminal matters, the federal courts have long acknowledged the separate authority of the United States Attorney General to control the course of the federal government's litigation, and it is presumed to be immune from judicial review. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995). As a general principle, the separation of powers under the U. S. Constitution precludes a court from directing that a prosecutor commence a particular prosecution. *Roe v. City and County of San Francisco*, 1997 W.L. 129025*8 (9th Cir. 1997). The functions of the prosecutors, such as initiating a criminal case by presenting evidence before a grand jury, "qualifies as an executive function within the exclusive prerogatives of the Attorney General." *United States v. Chanen*, 549 F.2d 1306-1313 (9th Cir. 1977). A court may not exercise its supervisory power in any way that encroaches on the prerogatives of the executive branch or the grand jury itself unless there is a clear basis in fact or in law for doing so. *Id.*

The only apparent exception to these principles is when there is an ongoing grand jury proceeding, and a court can intervene to direct or proscribe certain specific evidence before that pending grand jury. *See Application of Wood*, 833 F.2d 113 (8th Cir. 1987).

In the present case there is no ongoing grand jury proceeding. Instead, plaintiffs seek to compel the United States Attorney to present their new allegations to a grand jury. The court does not have the power to compel the United States Attorney to do so, and this claim is therefore dismissed.

Plaintiffs also seek a declaration that 18 U.S.C. § 1504 is unconstitutional because it prevents them from gaining access to a grand jury. However, that statute has no application to plaintiffs' allegations. Section 1504 is a criminal statute, for the purpose of preventing jury tampering. It has no application to a person seeking to have a grand jury convened and new charges presented, and it does not create any private cause of action in favor of plaintiffs. The claim is therefore dismissed.

Finally, plaintiffs seek a declaratory judgment that any American citizen can swear out a complaint before a United States Magistrate Judge. This claim is based upon a quotation from *Wood*, p. 116 which cited an 1872 charge to a federal grand jury. 30 F.Cas. 992 (CCD Cal 1872). The quotation is not applicable to plaintiffs' claims here. The quotation was simply telling the grand jury what the grand jury should or should not consider. And it does not present any basis for a blanket declaratory judgment that any private citizen can initiate a criminal complaint by filing before a United States Magistrate Judge.

The basic point is still that decisions whether or not to present new matters to a grand jury are vested to the discretion of the executive branch of government. This claim is also dismissed.

Because plaintiffs have already had an opportunity to amend their complaint and have not stated a cause of action, this action is now dismissed with prejudice.

IT IS SO ORDERED.

Dated: April 16, 1997.

/s/ Charles A. Legge
CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE